

January 20, 1999

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
850 Union Bank of California Building
900 Fourth Avenue
Seattle, Washington 98164
Telephone (206) 296-4660
Facsimile (206) 296-1654

REPORT AND DECISION ON CODE ENFORCEMENT APPEAL.

SUBJECT: Department of Development and Environmental Services File No. **E9800476**

JIM LADSON
Code Enforcement Appeal

Location: Approximately 12400 - 288th Avenue NE

Property Owner: Jim & Barbara Kajiya
31433 NE Big Rock Road
Duvall, WA 98019

Appellant: Jim Ladson
7335 128th Avenue NE
Kirkland, WA 98033

SUMMARY OF DECISION:

Department's Preliminary Recommendation:	Deny the appeal
Department's Final Recommendation:	Deny the appeal
Examiner's Decision:	Appeal denied

PRELIMINARY MATTERS:

Notice of appeal received by Examiner:	August 5, 1998
Statement of appeal received by Examiner:	August 5, 1998

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	November 11, 1998
Hearing Opened:	January 7, 1999
Hearing Closed:	January 7, 1999

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- wetlands
- sensitive areas
- drainage
- grading

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

THE APPEAL

1. Jim Ladson ("Appellant") appeals a May 7, 1998 Notice and Order issued by the Department of Development and Environmental Services, Code Enforcement Section ("DDES" or the "Department") regarding certain prohibited activities undertaken within a Federally inventoried Class 1 wetland located, at least in part, upon the former Ladson property. Appellant Ladson, in his May 19, 1998 Notice of Appeal argues that the wetland water level existing prior to the disputed activities "was not natural, sustainable, and not accomplished legally."
2. Appellant Ladson argues further that it would constitute condemnation or taking of his property without compensation to require replacement of an "illegal, unsafe, unsustainable and unpermitted structure, which was put in place by trespassers." In support of these stated grounds of appeal, the Appellant offers no testimony or evidence, arguing instead that the Department had failed to prove its case. He argues further, that the Department failed to prove that either "nature," or a trespasser, didn't remove the small earth-fill dam or berm at issue in this review. Moreover, he argues, requiring a property owner to maintain an artificially created "permanent high water level" constitutes taking without compensation.

Finally the Appellant argues that the Department had an obligation to advise him of "incomplete progress" after the responsible Code Enforcement Officer had visited the site following a meeting with the Appellant a few days earlier. He argues that the Department should have told him that his compliance efforts were incomplete before commencing civil penalties. This sequence of events he describes as "underhanded."

MOTION TO DISMISS

3. In hearing, the Appellant moved to dismiss the Notice and Order based upon an allegation that the Department failed to diligently and timely prosecute this matter as required by KCC 20.24.098. However, the Appellant himself failed to file this motion in writing as required by Examiner's Rules Section VI.D.1; and did not serve this motion upon the Department at least 21 days prior to hearing as required by the same rule. For these reasons, the motion was dismissed. The Appellant argued further that KCC 20.24.095 requires dismissal of the Notice and Order. However, KCC 20.24.095 only authorizes dismissal of *appeals* for untimeliness or lack of jurisdiction. A dismissal of the Ladson appeal would have results nearly identical to the Order entered on pages 5 and 6 of this Examiner's Report and Decision.

RELEVANT FACTS

4. As noted in finding no. 1, above, the wetland which is the subject of this review is a Class 1 wetland. That is, County wetland regulations and policies recognize the wetland as having exemplary flood storage and habitat value, as well as wetland vegetation and soils characteristics. It appears probable that the berm which holds water within the wetland is man-made. The development of the berm is presumed to have occurred prior to 1990. Aerial photographs in County records indicate that the wetland existed in 1990. The significance of 1990, the year that

the current version of County Sensitive Area regulations were adopted, was discussed extensively through the course of the hearing. Yet no person present testified that the berm had been created *since* 1990. Wetlands created as the result of legal (permitted) public or private activities since 1990 are not subject to County wetland protection law.

5. Code inspector testimony and photographs in evidence show that the berm at issue has been recently breached. Vertical shovel cuts in the soil are readily apparent. These shovel cuts are obviously recent and are obviously arranged in such a manner as to assure that the wetland drains. In addition, an old weir and appurtenant drainage improvements have been dislodged but not removed from the premises. Turned and exposed soil strongly suggests that these actions occurred within the relatively recent time frame cited by the Department. Thus, it is difficult to find the Appellant's suggestions that the breach occurred due to natural causes.
6. The Appellant has presented no legal authority that would make relevant his contention that "trespassers did it." KCC Title 23 clearly enforces County regulations against those who *commit* prohibited actions, but also against those who *maintain* prohibited conditions (results of actions). Thus, if someone dumps garbage on your property, that someone (if identified) may be subject to civil action taken by the property owner against him. That, however, does not release the property owner from liability due to *maintaining* that same code violation.
7. The Department's report to the "Zoning and Subdivision Examiner"¹ (exhibit no. 1) is found accurate. It is adopted and incorporated in this Report and Decision by this reference.
8. Any portion of any of the following conclusions which may be construed as findings is adopted here as such.

CONCLUSIONS:

1. Any portion of finding nos. 1 through 7, above, which may be construed as a conclusion is hereby adopted as such.
2. There is certainly no "taking" aspect to a law which requires preservation of that which already exists (and has existed in this case for a very long time); provided that, some reasonable use of the property remains. The courts have rather broadly interpreted the term *reasonable use*. The case law supports this conclusion no. 2. However, the case law will not be further reviewed here because the Examiner has no authority to make rulings on constitutional issues. The Examiner must accept adopted ordinances, including the ordinances upon which the Department relies in this code enforcement case, as lawful unless determined otherwise by a court upon higher review. In any event, the sensitive areas regulations contain a "reasonable use exception" which has never been requested by this Applicant. A reasonable use exception may be requested in association with an application for building permit, conditional use permit or other similar land development approval.
3. As noted in the findings above, the wetland, wetland buffer, berm, weir, culvert and cited activities of the Appellant all exist or occurred within an area regulated by KCC 21A.24 (sensitive areas). KCC 16.82.050.A prohibits "any clearing or grading without first having obtained a clearing and grading permit from the director." KCC 16.82.050 provides a number of exceptions; none of those

¹Meaning, presumably, the King County "Hearing Examiner."

exceptions apply in this case. Commonly cited exceptions concern cuts of less than five vertical feet not involving 100 cubic yards of earth on a single site, or fill of less than three vertical feet not involving more than 100 cubic yards on a single site. Neither of these exceptions applies here because all matters at issue exist or have occurred within a regulated sensitive area. *Both KCC 16.82.050.A.10 and -.050.A.11 state that such exceptions do not apply "if the clearing or grading is within a sensitive area as regulated in KCC 21A.24."*

KCC 16.82.050 identifies specific activities exempted from grading permit requirements within sensitive areas. These exemptions address such activities as normal and routine maintenance of existing lawns and landscaping; permitted agricultural uses (subject to certain regulations); emergency tree removal; normal and routine horticultural activities; normal and routine maintenance of existing public parks and private/ public golf courses; removal of noxious weeds; pruning and limbing of vegetation for *above-ground* electrical and telecommunication facilities; and so on. None of these exemptions apply in this case. None of these exemptions allow the property owner to create or maintain alterations of existing land contours within the regulated sensitive area.

Having reviewed the regulations which apply, I find that it would be legally reasonable and appropriate to allow *cleaning* of a metal weir or culvert. It also would be reasonable and appropriate to allow the removal of naturally accumulated obstructing debris deposited recently (say, after a peak storm event). To wholly remove the entire installation without any grading permits, drain the wetland and increase flooding probability downstream simply is not authorized by applicable law.

4. KCC 21A.24.050 provides exemptions from sensitive areas regulations such as: emergencies which threaten the public health, safety and welfare, or which pose an imminent risk of damage to private property; agricultural activities; road maintenance (subject to certain limitations); and so on. There is no evidence in this hearing record that any of these exemptions apply to the case at hand.

KCC 21A.24.060 provides partial exemptions from sensitive areas regulations, such as livestock grazing. There is no evidence in this hearing record that any of the partial exemptions established by KCC 21A.24.060 applies. KCC 21A.24.070 establishes certain *exceptions*, such as public agency and utility development or evidence that the application of the sensitive areas regulation to a particular property would deny all reasonable use of that property. Even in the case of *exceptions*, the developer must first obtain DDES review and concurrence. There is no evidence in the record that any KCC 21A.24.070 exception applies in this case, or that the Appellant ever sought approval for any particular exception.

The bottom line is this: Applicable grading regulations and sensitive areas regulations, in conjunction with the facts of record, contain absolutely no basis to conclude that the activities cited in the Department's May 7, 1998 Notice and Order were either exempt or excepted activities.

5. The hearing record contains no challenge to the Department's citation and contention that the Appellant created no adequate erosion/sedimentation control measures, either temporary or permanent. This brings us to the Appellant's assertion that the Department "failed" to notify him following a re-inspection visit, that his remedial measures were inadequate. As indicated in the findings above, the Appellant argues that it was wrong for the Department not to tell the

Appellant that, in the Department's judgment, the remedial measures taken by the Appellant were not yet sufficient.

This Appellant's argument must be rejected for the following reasons:

- A. The following notice appears on the first page of the Department's May 7, 1998 Notice and Order:

NOTE: It has been determined that these violations will cause immediate and irreparable harm if not corrected IMMEDIATELY. Therefore enforcement will not be stayed during pendency of any appeal. KCC 23.12.08.(B).
[Emphasis contained in the original.]

- B. Then, immediately preceding the signature of Code Enforcement Section Chief, Kenneth W. Dinsmore, at the conclusion of that same Notice and Order:

DUTY TO NOTIFY

You have the DUTY TO NOTIFY the Department of Development and Environmental Services—Land Use Services Division (Grant Smith's telephone # 206-296-7062) OF ANY ACTIONS TO CORRECT THE ABOVE VIOLATIONS YOU HAVE TAKEN SINCE THE RECEIPT OF THIS NOTICE AND ORDER. [Bold face, capitalization and underlining contained in the original.]

- C. There is no evidence in this hearing record that the Appellant ever complied with the terms of the "Duty To Notify" Notice and Order provision. Consequently, even if DDES staff had passed by or inspected the subject property 100 times, the Department has no obligation to inform the Appellant as to compliance or noncompliance in view of the Appellant's failure to comply with the "Duty To Notify" mandate.
6. KCC 23.36.020 authorizes the Department to impose immediate civil penalties when "the violation poses a significant threat of immediate and/or irreparable harm," and so states in any Notice and Order issued. The Notice and Order (exhibit no. 8) complies with this requirement. Further, considering the stormwater storage function of this wetland (whether incidental or intentional does not matter) the Department's civil penalty assessment prior to hearing most certainly complies with this Code standard.
7. There is no evidence in this hearing record that the Department violated any limitation contained in KCC 23.02.110 (Right Of Entry).
8. The hearing record contains suggestions (by the Appellant) that perhaps the activities at issue in the subject Notice and Order were undertaken by a trespasser or trespassers. See also finding nos. 2 and 6. However, absolutely no evidence has been presented to the hearing record to support this theory.

9. The civil penalty exception provided by KCC 23.02.130.B provides this Appellant a possible avenue to Departmental leniency regarding the assessment of civil penalty.

DECISION:

For the reasons indicated above, the appeal is DENIED. The May 7, 1998 DDES Notice and Order is AFFIRMED.

ORDER:

- A. The Appellant shall pay the \$1000.00 (one thousand dollar) civil penalty assessed by the Department (invoice #88069; exhibit no. 11).
- B. The entire civil penalty shall be paid within 21 (twenty-one) days from the date of this Order, unless the Department and the Appellant mutually agree upon some other payment schedule, or agree upon a community service program such as described in paragraph C of this Order. This paragraph B of this Order imposes no obligation upon the Department in that regard.
- C. In lieu of the \$1000.00 (one thousand dollar) assessment, as authorized by KCC 23.24.080, the DDES Director may authorize Appellant Ladson to perform community service. The activities and hours invested in such community service must be well documented by a person, organization, or agency not associated with Appellant Ladson for any other reason than compliance with this Order. (The King County Department of Natural Resources, Water and Land Resources Division, may be aware of an agency or of a community based stream or wetland enhancement program or organization that would be appropriate.)
- D. This Order shall not in any manner limit or restrict the Department or the King County Prosecutor from any further prosecution of this case they may seek pursuant to KCC Title 23.
- E. As indicated in KCC 23.02.040.G, the Department may use the services of a collection agency.

ORDERED this 20th day of January, 1999.

R.S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 20th day of January, 1999, to the following parties and interested persons:

Brett Boehm
Jim and Barbara Kajiya
Jim Ladson
Ken Dinsmore

Randy Sandin
Grant Smith
Lisa Walker
Fred White

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JANUARY 7, 1999, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES' FILE NO. E9800476 – LADSON CODE ENFORCEMENT APPEAL.

R.S. Titus was the Hearing Examiner in this matter. Participating at the hearing were Fred White, Grant Smith and Mason Bowles, representing the County; and Jim Ladson.

The following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 Department of Development and Environmental Services Report for case No. E9800476
- Exhibit No. 2 Code enforcement complaint research form dated May 5, 1998, with attachments
- Exhibit No. 3 Comment sheet for File No. E9800476
- Exhibit No. 4 Wetland definition from KCC 21A.06.1415
- Exhibit No. 5 Photographs of the site taken by Grant Smith on May 5, 1998, and May 12, 1998
- Exhibit No. 6 Right of Entry KCC 23.08.040
- Exhibit No. 7 Stop Work Order to Jim Ladson dated May 7, 1998
- Exhibit No. 8 Notice and Order to Jim Ladson dated May 7, 1998
- Exhibit No. 9 Stop Work Notice posted by Lamar Reed dated May 7, 1998
- Exhibit No. 10 E-mail dated May 12, 1998, from Mason Bowles
- Exhibit No. 11 Code Enforcement invoice dated May 29, 1998
- Exhibit No. 12 Claim of Lien dated June 29, 1998
- Exhibit No. 13 July 5, 1998, letter from Thad McManus with attachments
- Exhibit No. 14 Letter from Grant Smith to Barbara Kajiya dated September 2, 1998
- Exhibit No. 15 Fax from Barbara Kajiya received by DDES on September 8, 1998
- Exhibit No. 16 Notice of Continuance on Call dated September 8, 1998
- Exhibit No. 17 E-mail message to Examiner O'Connor from Grant Smith dated October 26, 1998
- Exhibit No. 18 Notice of Hearing dated November 12, 1998
- Exhibit No. 19 Fax to Jim Ladson dated October 29, 1998
- Exhibit No. 20 E-mail message from Grant Smith to Fred White et al dated November 17, 1998
- Exhibit No. 21 Notice of Hearing dated November 30, 1998
- Exhibit No. 22 Fax to Jim Ladson dated December 3, 1998
- Exhibit No. 23 Fax from Mr. Ladson dated December 7, 1998, with Fax cover sheet to R. S. Titus dated December 11, 1998
- Exhibit No. 24 Cover letter from Flora Skelly for pre-application request on the behalf of the Kajiya's
- Exhibit No. 25 Notice of Appeal from Jim Ladson dated May 19, 1998
- Exhibit No. 26 Ariel photograph of the site from 1996
- Exhibit No. 27 King County Code 16.82
- Exhibit No. 28 King County Code 21A.24
- Exhibit No. 29 Photograph submitted by Appellant Ladson